



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII



IN THE MATTER OF)
)
)
MASJID AL MU'MINUN, INC.) Docket No. TSCA-7-99-0026
)
Respondent)

INITIAL DECISION AND DEFAULT ORDER

This initial decision is upon motion for issuance of a default order in this proceeding, filed by Complainant, Director of the Air RCRA & Toxics Division, Region VII, on July 28, 1999.¹ The motion seeks an order assessing a civil penalty in the amount of two thousand dollars (\$2,000) against Respondent, Masjid Al Mu'minun, Inc., as owner of the Clara Mohammed School in St. Louis, Missouri. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules" or "C.R.O.P."),² 40 C.F.R. Part 22, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Order is hereby GRANTED.

I. FINDINGS OF FACT

¹Complainant previously filed identical motions for default order in this proceeding on May 12, 1999 and June 10, 1999. Although Respondent did not oppose the earlier motion, it was denied for failure to include an explanation of the factual basis to support the assessment of a penalty. Decision on Motion for Default Order, July 23, 1999.

²The Consolidated Rules were revised, effective August 23, 1999, at 64 Fed. Reg. 40,138 (July 23, 1999) (the "revised rules"). The revised rules apply to proceedings commenced prior to the August 23 effective date, unless a "substantial injustice" would result by application of the revised rules. In this proceeding, all of the filings predated the revised rules, Respondent was given notice of the proceeding in reference to the rules in effect prior to August 23, and Respondent was provided a copy of the rules in existence prior to the August 23 revisions. Therefore, the applicable rules are 40 C.F.R. Part 22, as in effect prior to August 23, 1999 (the "preamended rules"). References herein are to the preamended rules.

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record, I make the following findings of fact:

1. The Respondent is Masjid Al Mu'minun, Inc., a non-profit corporation located in St. Louis, Missouri.

2. Section 202(7) of TSCA, 15 U.S.C. § 2642(7), defines "local educational agency" to include "the owner of any private, nonprofit elementary or secondary school building."

3. The Respondent owns a building located at 1434 North Grand, in St. Louis, Missouri, which houses the Clara Mohammed School, used by Respondent as a private school serving kindergarten through grade seven.

4. Section 203(b) of TSCA, 15 U.S.C. § 2643(b), provides that the Environmental Protection Agency ("EPA") must promulgate regulations requiring the inspection of school buildings and specifying the procedures for determining whether asbestos-containing material is present in a school under the authority of a local educational agency.

5. Pursuant to section 203(b) of TSCA, EPA promulgated 40 C.F.R. § 763.85, which states that local educational agencies must inspect, before October 12, 1988, each school building they lease, own, or otherwise use as a school building to identify all locations of friable and nonfriable asbestos-containing material.

6. Title 40 C.F.R. § 763.85 also states that any building leased or acquired on or after October 12, 1988 that is to be used as a school building, shall be inspected prior to its use as a school building.

7. Section 203(i) of TSCA, 15 U.S.C. § 2643(i), provides that EPA must promulgate regulations requiring each local educational agency to develop an asbestos management plan.

8. Pursuant to section 203(i) of TSCA, EPA promulgated 40 C.F.R. § 763.93, which states that local educational agencies must develop, by October 12, 1988, an asbestos

management plan for each school, including all buildings that they own, lease, or otherwise use as school buildings, and submit such plan to an agency of the state designated by the Governor of the state in which the local educational agency is located .

9. Title 40 C.F.R. § 763.93 also states that, for any building leased or otherwise acquired after October 12, 1988, the local educational agency must include the building in its management plan prior to its use as a school building.

10. The building in use as the Clara Mohammed School was inspected by a representative of EPA on or about February 23, 1999, to determine the local educational agency's compliance with TSCA and implementing regulations.

11. As of February 23, 1999, the school building had not been inspected to identify the location of asbestos-containing material.

12. As of February 23, 1999, Respondent did not prepare an asbestos management plan for the Clara Mohammed School, and did not submit an asbestos management plan to the agency designated by the Governor of Missouri.

13. On April 6, 1999, Complainant initiated a civil administrative proceeding for the assessment of a civil penalty pursuant to section 207(a) of TSCA, 15 U.S.C. § 2647(a), by issuing a Complaint and Notice of Opportunity for Hearing.

14. On April 8, 1999, Respondent received the Complaint, and a return receipt for the Complaint was subsequently filed with the Regional Hearing Clerk, EPA, Region VII.

15. The Complaint alleged that Respondent had violated section 207(a) of TSCA, 15 U.S.C. § 2647(a) and EPA regulations implementing TSCA, in that it had failed to inspect the Clara Mohammed School to determine the presence of asbestos-containing materials, and that it had failed to develop an asbestos management plan. The Complaint proposed to assess a penalty of two thousand dollars (\$2,000) for these alleged violations.

16. The Complaint stated that Respondent had a right to request a hearing, and that, in order to avoid being in default, Respondent was required to file a response to the Complaint within twenty days of service. The Complaint also stated that failure to file a timely answer would constitute an admission of the allegations in the Complaint, and that a default order might then be issued, resulting in the proposed penalty becoming due without further proceedings.

17. The Respondent did not file an answer or other response to the Complaint within twenty days of service, and has not, to date, filed an answer or other response to the complaint.

18. On May 12, 1999, Complainant filed a Motion for Default Order and a proposed order, stating as grounds therefor that Respondent had failed to file an answer to the Complaint. On June 10, 1999, Complainant filed an identical Motion for Default Order and proposed order, which was received by Respondent on June 14, 1999.

19. The Respondent did not file a response to the motion described in paragraph 18.

20. The motion described in paragraph 18 was denied in a decision dated July 23, 1999.

21. On July 28, 1999, Complainant filed a subsequent Motion for Default Order, and a proposed order. This motion included, as an attachment, information relating to the calculation of the proposed penalty in this matter. The motion was served on Respondent by certified mail, return receipt requested, on July 28, 1999.

22. On August 9, 1999, Complainant filed, and served on Respondent, by certified mail, return receipt requested, a "Supplement to the Motion For Default Order Filed July 28, 1999," which included additional information concerning Complainant's calculation of the proposed penalty. Although this supplement contains a different docket number, it is clear from the context and other identifiers that it supplements the July 28, 1999 motion.

23. The file contains a "Statement of Personal Delivery," dated September 7, 1999, signed by a representative of the EPA, indicating, from the context, that the July 28, 1999 default

motion, and the August 9 supplement, were personally served on Respondent on September 7, 1999.

24. The Respondent has not, to date, filed any response to the July 28, 1999 motion.

II. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record, I make the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Respondent, in accordance with the Consolidated Rules, 40 C.F.R. § 22.05(b)(1) (1998), which is applicable to this proceeding.

2. Respondent was required to file an answer to the Complaint within twenty (20) days of service of the Complaint. 40 C.F.R. § 22.15(a) (1998).

3. Respondent's failure to file an answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

4. The July 28, 1999 Motion for Default Order and the August 9, 1999 supplement to the motion were lawfully and properly served on Respondent on September 7, 1999.

5. Respondent was required to file any response to the motion within 20 days of service. 40 C.F.R. §22.17(a).

6. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion. 40 C.F.R. §22.16(b).

7. Respondent is a "Local Educational Agency," as defined in section 202(7) of TSCA, 15 U.S.C. §2642(7), and in 40 C.F.R. §763.83.

8. The building owned by Respondent, located at 1434 North Grand, St. Louis, Missouri, is a "school building," as defined in section 202(13) of TSCA, 15 U.S.C. §2642(13) and in 40

C.F.R. §763.83.

9. Section 203(b) of TSCA, 15 U.S.C. §2643(b) and 40 C.F.R. §763.85(a) require that Respondent have inspected its school building identified in paragraph 8, above, for the presence of asbestos-containing materials, no later than the date it was first used as a school building.

10. Sections 203(i) and 205(d) of TSCA, 15 U.S.C. §§2643(i) and 2645(d), require that Respondent have developed and submitted to the Governor of the state of Missouri an asbestos management plan for the school building identified in paragraph 8, above.

11. Respondent's failure to conduct such an inspection is a violation of section 203(b) of TSCA, for which Respondent is liable for a civil penalty under section 207(a)(1) of TSCA, 15 U.S.C. §2647(a)(1).

12. Respondent's failure to develop a management plan is a violation of section 203(i) of TSCA, for which Respondent is liable for a civil penalty under section 207(a)(3) of TSCA, 15 U.S.C. §2647(a)(3).

13. Section 207(a) of TSCA, 15 U.S.C. §2647(a), and 40 C.F.R. §19.4, Table 1, authorize the assessment of a civil penalty of not more than five thousand five hundred dollars (\$5,500) against Respondent for each of the violations described in paragraphs 11 and 12 above, for each day in which the violations continue.

14. Respondent's failure to file a timely answer to the complaint or otherwise respond to the Complaint, is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violations described above.

15. Respondent's failure to file a response to Complainant's Motion for Default Order, dated July 28, 1999 is deemed a waiver of Respondent's right to object to the issuance of this Default Order.

III. DETERMINATION OF CIVIL PENALTY AMOUNT

Section 207(c)(1) of TSCA, 15 U.S.C. §2647(c)(1), provides that, in determining the amount of the civil penalty to be assessed under section 207(a), the following factors must be considered: (1) the significance of the violation; (2) the culpability of the violator, including prior history of violation of TSCA; (3) ability of the violator to pay a penalty; and (4) ability of the violator to continue to provide educational services to the community. Section 207(a) of TSCA also provides that penalties shall be assessed in the same manner as under section 16 of TSCA, Title I, 15 U.S.C. §2615, which includes, as an additional penalty assessment factor, “such other matters as justice may require.” The EPA has also issued an Interim Final Enforcement Policy for the Asbestos Hazard Emergency Response Act, dated January 31, 1989, and amended July 17, 1998, which is used as guidance for the assessment of penalties under TSCA, Title II, 15 U.S.C. §§2641, et seq.

Complainant requests the assessment of a penalty of two thousand dollars (\$2,000) for the violations stated in the Complaint, based on its analysis of the statutory factors and the EPA policy cited above. In its July 28, 1999 motion, and in its August 9, 1999 “Supplement to the Motion For Default Order Filed July 28, 1999,” Complainant includes information showing the derivation of the requested penalty. In determining the significance of the violations, Complainant considered that, due to the failure to inspect for the presence of asbestos, the quantity of asbestos was unknown, and that the potential and likelihood for exposure to occupants of the building were high. Complainant also considered that there were no known prior violations of TSCA attributable to Respondent, and Complainant made no adjustments for culpability. Complainant also considered Respondent’s ability to pay and ability to continue to provide educational services in arriving at the proposed penalty of \$2000.³ Complainant made

³ Complainant calculated a penalty for only one of the violations, failure to inspect, and did not calculate a penalty for failure to develop a maintenance plan. Complainant explained that it calculated a penalty only for one violation in consideration of factors relating to Respondent’s

no adjustments relating to “other matters as justice may require.” As previously noted, Respondent has not provided any information concerning the appropriateness of the penalty (or any other aspect of this matter), despite numerous opportunities.

I have determined that the penalty amount proposed in the motion for default order is appropriate based on the record, and on section 207 of TSCA. The penalty amount takes due account of the significance of the violations, since inspection for the presence of asbestos and planning for asbestos management in the school building are key elements in protecting children and other building occupants from exposure to asbestos. The penalty amount also represents an appropriate reduction of the amount which might otherwise be imposed (based on the significance of the violations), in light of the potential that Respondent would be unable to pay a higher penalty. The penalty amount is also substantially lower than the statutory maximum penalty of \$5,500 per day per violation. In addition, and as reflected in the Default Order below, section 207(a) of TSCA provides that the assessed penalty, or portion thereof, is to be used to comply with TSCA, so that Respondent will not, as a result of assessment of the penalty, be deprived of funds necessary to remedy its violations. The record supports a \$2000 penalty, and does not contain information indicating that any other adjustments to the penalty should be made based on the statutory factors.

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

A. Respondent is assessed a civil penalty in the amount of two thousand dollars

ability to pay a penalty. Supplement to Motion for Default Order, Attachment 2, p. 2. While Complainant’s method of analysis might have benefitted from calculating a penalty for both violations and then deducting an amount based on consideration of ability to pay and ability to continue to provide educational services to the community, I find, for the reasons stated herein, that the resulting penalty of \$2000 is appropriate, and the alternative suggested herein would not result in a lower penalty. In addition, since the Complaint proposed a \$2000 penalty, I am limited by 40 C.F.R. §22.27(b)(1998) to that amount as a maximum assessed penalty.

(\$2,000). B. Pursuant to section 207(a) of TSCA, 15 U.S.C. §2647(a), respondent shall use the civil penalty for the purpose of complying with the requirements of TSCA, and in particular, the requirements of sections 203(b) and 203(i) and EPA regulations thereunder at 40 C.F.R. Part 763.

C. Pursuant to 40 C.F.R. §22.27(c) (1998), this Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed, pursuant to 40 C.F.R. §22.30(a)(1) (1998), to the Environmental Appeals Board within twenty (20) days after service on the parties, or unless the Environmental Appeals Board elects, sua sponte, to review it. Respondent shall, within sixty (60) calendar days after this Default Order has become final, forward a cashier's or certified check, payable to the order of the "Treasurer, United States of America." The amount of the payment shall be two thousand dollars (\$2,000), unless waived in whole or in part pursuant to paragraph D, below. The check shall state on the reverse side, "For Deposit Into the Asbestos Trust Fund, 20 U.S.C. §4022." Respondent shall mail the check to the following address:

U.S. Environmental Protection Agency
Attention: Asbestos Trust Fund
P.O. Box 360227M
Pittsburgh, Pennsylvania 15251

In addition, Respondent shall mail a copy of the check to the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

D. The Respondent shall pay the full civil penalty amount specified in paragraph A and unless waived in whole or in part pursuant to this paragraph D. Any costs of compliance claimed by Respondent as waiver of all or a portion of the penalty amount shall be documented

by Respondent through submission to Complainant of notarized receipts or other evidence of costs incurred, together with a detailed statement of the activities for which the costs are incurred. Respondent should, immediately after the effective date of this Default Order, contact Complainant's Regional Asbestos Coordinator, at the address below, if it wishes to obtain a waiver of any of the penalty amount:

Gregory Crable
Regional Asbestos Coordinator
901 North 5th Street
Kansas City, Kansas 66101

The amount of the civil penalty may be waived in whole or in part as follows:

1. If the costs of compliance are equal to, or exceed the civil penalty amount specified in paragraph A, the costs of compliance shall represent full payment of the penalty, and no further payment is necessary.
2. If the costs of compliance are less than the civil penalty amount in paragraph A, Respondent shall pay, by the date and in the manner specified in paragraph C, the amount equal to the civil penalty amount less the costs of compliance.

IT IS SO ORDERED.

Dated: July 23, 1999

/s/
Robert L. Patrick
Regional Judicial Officer
Region VII